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Thomas J. Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3C252
Washington, D.C. 20554

Re: 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205

Dear Mr. Sugrue:

On behalf of Cellular Communications of Puerto Rico, Inc. ("CCPR"), I am writing to urge the Commission to act expeditiously to eliminate Section 20.6 of the Commission's rules, 47 C.F.R. § 20.6, which limits the amount of spectrum that can be held by any one CMRS licensee to 45 MHz. CCPR has been providing cellular service throughout Puerto Rico and the United States Virgin Islands for almost ten years and is the largest competitor in Puerto Rico to the incumbent LEC, Puerto Rico Telephone Company ("PRTC").

A major part of CCPR's success is attributable to its quick response to customer demand and the provision of new and innovative services. For example, CCPR recently launched a prepaid cellular service and provides over-the-phone activation, both of which were greeted enthusiastically by consumers. CCPR is currently pursuing a calling party pays initiative and, with PRTC's cooperation, it hopes to make the service widely available in the near future. On an island where customers often have to wait months to receive landline service, the wireless alternative is very attractive.

CCPR is concerned that maintaining this high quality of service could be hampered by spectrum congestion and the spectrum cap's restriction on entering into strategic alliances with other local CMRS providers or their affiliates. The 1996 Act requires the Commission to eliminate the spectrum cap unless it can continue to justify its existence. The record in this

proceeding offers no basis for retaining these rules. Indeed, CCPR's experience demonstrates exactly the opposite. The spectrum cap ultimately harms consumers with no corresponding demonstrable benefit.

I. The Commission Should Eliminate the Spectrum Cap

As set forth in the overwhelming majority of comments and reply comments filed in this proceeding, the CMRS spectrum cap has outlived any limited useful purpose it may once have had. There is no demonstrable need to limit the aggregation of spectrum by wireless carriers in any market -- certainly not in the absence of specific findings that the public interest is being disserved. In fact, the spectrum cap itself harms the public interest by limiting the expansion of services to rural and high-cost markets, driving costs up and scarce investment resources out, and reducing overall efficiency.

A. The Spectrum Cap is Unnecessary

The Commission has recognized that regulations are only called for "when there is an identifiable market failure." 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Notice of Proposed Rulemaking, WT Docket No. 98-205, FCC 98-308 (rel. Dec. 10, 1998), at ¶ 5 ("Biennial Review NPRM"). Even when there is such a failure, rules optimally should be "craft[ed] narrowly" so as to "impose only the minimum restraint on the market necessary to achieve the public interest." Id.

At this point it is clear that there is no evidence of a market failure that must be addressed. Instead, as recognized by the Commission, there is ample evidence of vibrant competition in the CMRS marketplace. See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report, FCC 98-81, at 2 (rel. June 11, 1998) ("Third Annual Report"). The vast majority of the public today has a choice of several facilities-based CMRS providers. Id. at 3. Potential competitors are entering or on the verge of entering markets nationwide.

Certainly, nothing about the CMRS market suggests the sort of demonstrable market failure necessary to justify prophylactic, structural regulation in the form of a cap on spectrum. At the same time, the Commission has failed to show that mergers and other transactions involving the acquisition of more than 45 MHz of spectrum necessarily raise competitive concerns. The spectrum cap merits reconsideration at least because of its demonstrable failure to target market deficiencies narrowly. There is also no evidence in the record that acquiring any particular amount of spectrum in and of itself is anti-competitive. Indeed, wireless markets themselves are not particularly susceptible to the exercise of market power. There are numerous well-financed CMRS providers, and it is relatively easy for carriers to expand output to serve new customers in response to an attempted price increase by a large competitor. Because the

CMRS market is also a hotbed of technological innovation, it would be particularly difficult for any competitor or group of competitors to drive up end user prices.

For these reasons, the spectrum cap fails to advance any consumer interests in the market as a whole. While some might believe that the cap offers benefits to consumers in rural and other high-cost markets, there is no basis in the record to conclude such consumers might be well-served if the cap is retained. To the contrary -- the spectrum cap increases costs, reduces innovation, and undermines the very benefits it is intended to advance.

B. The Spectrum Cap Harms the Public Interest

Supporters of the spectrum cap talk about wireless competition as if it were directly attributable to the cap. This belies common sense. The rules have one effect: they limit the amount of spectrum any individual can acquire. Certainly, the rules put a premium on spectrum as an "input" for CMRS providers -- up to the limit imposed by the cap. The problem is, nothing about this encourages: (1) widespread deployment of wireless services; (2) enhanced quality; or (3) lower prices to consumers.

Preventing firms from exploiting the economies of scale and scope gained by the use of additional spectrum could in fact reduce the number of competitors in a market. To the extent competitors are forced to invest in compression technologies that cost more than additional spectrum would in the absence of a cap, they could be squeezed out of marginal markets where the necessary return on investment is missing. Efficient competitors, most likely to offer the combination of price and service sought after by consumers, are prevented from expanding -- while inefficient competitors are protected. How all this benefits consumers is unclear.

Indeed, a firm that currently has 45 MHz of spectrum could use additional spectrum to expand services to underserved populations in rural and other high-cost markets. This could be accomplished either by putting newly allocated spectrum to use or by using previously assigned spectrum more efficiently than a former competitor. As the Commission has predicted, some low density areas may not warrant the additional investment necessary to encourage such entry. There, the spectrum cap is particularly unwarranted.

Finally, the Commission has substantial record evidence to show that the spectrum cap reduces the incentive of competitors to cut prices, increase quality, and innovate. Innovation is critically important in this market, as the Commission well knows. It is no coincidence that hard-to-reach customers are usually the last to be served. The cap does nothing to alleviate their plight; in fact, it exacerbates their isolation. The cap forces competitors to invest in ways to expand the usefulness of currently available spectrum, but once the limit is reached there is no remaining incentive to invest any more. The cap only "rewards" investment that economizes on spectrum use. Other investment takes a back seat and is not encouraged.

II. The Commission Should Replace the Spectrum Cap with Case-by-Case Review

Instead of imposing rigid and inflexible prophylactic rules, the Commission should rely upon individual marketplace assessments to determine whether particular transactions are anti-competitive. The spectrum cap ill-serves the purposes for which it was created. Instead, the Commission could use well-established tools to analyze acquisitions of spectrum. The same "share" of spectrum in one market will not necessarily have the same effect in a different market. The Commission should recognize that, especially where the costs of providing service are already quite high (for example, Puerto Rico and the U.S. Virgin Islands), rules like this fail to advance any measurable public objective.

Limiting the availability of spectrum, like limiting the availability of any necessary input into a product or service, necessarily drives up costs and reduces output to consumers. There is no substantial benefit to the so-called "predictive value" embodied in these rules. Instead of maintaining this prohibition, the Commission should focus upon whether a particular transaction benefits or harms the public interest.

Conclusion

As set forth above, there is no compelling reason to retain the CMRS spectrum cap. Wireless markets have outgrown the need for such regulation, and consumers will suffer if competitors are not allowed to utilize spectrum in the manner most suitable for providing needed services – especially in rural markets. Instead of relying on the cap, the Commission should review transactions on a case-by-case basis to ensure no aggregation of spectrum disserves the public interest. Doing so would be entirely consistent with the purpose of this Biennial Review process.

Sincerely,

Sara F. Seidman

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